1994

Randy Chanhmany v. Joyce A. Preston, Brian D. Bone : Brief of Appellee

Utah Court of Appeals

Terry M. Plant; Bradley R. Helsten; Hanson, Epperson & Smith.
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IN THE UTAH COURT OF APPEALS

RANDY CHANHMANY, Plaintiff/Appellant, vs. JOYCE A. PRESTON and BRIAN D. BONE, Defendants/Appellees.	)	Case No. 940036 CA Priority No. 15

BRIEF OF APPELLEE BONE

APPEAL FROM A FINAL JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH HONORABLE JOHN A. ROKICH PRESIDING

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I.

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the caption.

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STATEMENT OF JURISDICTION

Appellee agrees with Appellant's statement of jurisdiction.

V.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Bone submits that the issues and applicable standards of appellate review are as follows:

1. Whether a plaintiff who fails to prove any threshold requirement under Utah no-fault law may recover a general damage verdict.

2. Whether the district court erred in striking Plaintiff's general damage award when the jury found Plaintiff failed to satisfy the $3,000 medical expense threshold required to maintain an action for general damages under Utah's no-fault law, U.C.A. § 31A-22-309.

3. Whether there was evidence upon which the jury could find that the Plaintiff incurred less than $3,000 in medical expenses related to the accident.

4. Whether plaintiff has waived any claim of jury prejudice by failing to request jurors to be excused for cause or failure to exercise preemptory challenges, where the alleged prejudice was known by counsel prior to empanelment of the jury.

5. Whether plaintiff's failure to request or object to the court's failure to include instructions or special verdict forms

addressing permanent disability constitutes waiver of error on appeal.

6. Whether the failure to give instructions on permanent disability is harmless error in light of the evidence that plaintiff suffered no objective impairment.

STANDARD OF REVIEW

The standard of review of denial of motion for new trial is for abuse of discretion. Christensen v. Jewkes, 761 P.2d 1315 (Utah 1988).

With respect to issues 1 and 2, questions of law are to be reviewed for correctness. Ward v. Richfield City, 798 P.2d 757, 759 (Utah 1990).

With respect to issue 3, "To successfully attack the verdict, an appellant must marshall all the evidence supporting the verdict and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." Hind v. Quilles, 745 P.2d 1239 (Utah 1987).

Review of a claim of insufficiency of the evidence to support a verdict will be reversed only if, in reviewing the evidence in the light most favorable to the verdict, it concludes the evidence is insufficient to support the award. Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987). Hansen v. Stewart, 761 P.2d 14 (Utah 1988).

With respect to issue 4, where the party knows of potential juror prejudice or bias, challenge must be asserted before the jury is sworn, otherwise the error is waived. Burton v. Z.C.M.I., 249 P.2d 514 (Utah 1952).

With respect to issues 5 and 6, Appellate Courts will not review the failure to object to instructions or objection to failure to give instructions or special verdicts, except in special circumstances. The burden of showing special circumstances exist is on the party claim error. U.R.C.P. 51; E.A. Strout W. Realty Agency v. W.C. Foy & Sons, 665 P.2d 1320 (Utah 1983); Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239 (Utah 1987).

VI.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

Utah Code Annotated § 31A-22-309

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VII.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of an automobile accident involving Plaintiff Chanhmany, and Defendants Bone and Preston.

B. Course of Proceedings

The case was tried by jury April 27-29, 1993. At the conclusion of the case, the jury returned a verdict finding Brian Bone 100 percent negligent. The jury found Plaintiff incurred $2,100 in medical expenses. The jury further awarded general damages in the amount of $3,000. R. 342-343.

Plaintiff did not request instructions regarding threshold requirements under Utah no-fault law or request instructions or special verdicts regarding whether Plaintiff was permanently disabled as a result of the accident. Plaintiff's own proposed jury instructions merely listed disability as an element of general damages. R. 106, 111.

The Defendant brought a motion to strike the $3,000 general damage award based on Plaintiff's failure to meet the no-fault threshold for medical expenses. The court granted Defendant's motion and struck the general damage award. R. 392-394; R. 391.

Plaintiff filed an exception and motion for new trial which was denied. R. 425. This appeal followed.

C. Statement of the Facts

Appellees accept Plaintiff's facts regarding the circumstances and cause of the accident.

At *voir dire* of the jury, Plaintiff's counsel was aware of the expressed reservations of two jurors regarding the propriety of treatment by chiropractors. Despite the reservations, Plaintiff's counsel passed the jury for cause without objection to Mr. Nordstrom or Mr. Staheli in chambers, TR. 45, or in open court TR. 46. Further, Plaintiff's counsel did not exercise any preemptory challenges to excuse the now allegedly prejudiced or biased jurors. TR 46-47.

In her case in chief, Plaintiff alleged $3,299.09 in medical expenses were related to the accident. TR. 278-79, Exhibit 3.

Plaintiff admitted, however, that she did not seek treatment for nearly a one-year period, from September 13, 1989 to November of 1990. See TR. 372; Exhibit P-3; TR. 135. Plaintiff's return for treatment also coincided with her second pregnancy, TR. 159, which her doctor admitted could have been the sole cause of her back pain. TR. 160-161. Plaintiff also admitted that after the birth of her child she did not do any of the exercises prescribed by her doctors. TR. 80.

Plaintiff did not offer any evidence that she suffered a permanent disability. Instead, Plaintiff elicited evidence that she had received a permanent impairment rating from both Plaintiff's and Defendants' doctors ranging from 6.8 percent to

12 percent. There was evidence offered that an impairment did not mean that Plaintiff was disabled. TR. 221-222. There was also evidence that Plaintiff's impairment rating had no objective basis whatsoever. TR. 217.

The trial court did not instruct the jury regarding permanent disability because no evidence of permanent disability was before the court. Moreover, Plaintiff failed to request any instruction on permanent disability or object to the court's failure to include instructions on permanent disability to the jury. Further, Plaintiff did not offer any special verdict requiring the jury to determine whether Plaintiff was permanently disabled as a result of the accident. Instead, the Plaintiff argued disability was part of Plaintiff's general damages.

The jury found Bone 100 percent negligent and awarded Plaintiff $2,100 in medical expenses and $3,000 in general damages. The court, on motion, struck the general damages and denied Plaintiff's motion for additur or a new trial finding that Plaintiff had failed to satisfy the threshold required by Utah no-fault law. TR. 428-429.

VIII.

SUMMARY OF ARGUMENTS

Where a plaintiff fails to prove at trial that no-fault thresholds have been met, she may not maintain an action for general damages and may not recover any verdict for general damages in her favor.

The plain language of the statute and the specific intent of no-fault law mandate a jury award for general damages be stricken where Plaintiff fails to establish no-fault thresholds have been met. Moreover, it is Plaintiff's burden to plead and prove all the elements of her case; including threshold elements.

There was ample evidence upon which the jury could base its decision that Plaintiff incurred only $2,100 in medical expenses related to the accident. Plaintiff also failed to meet the no-fault threshold by failing to plead and prove she sustained a permanent disability as a result of the accident. Plaintiff did not prosecute her claim based on permanent disability, but, instead, she claimed impairment as a measure of general damages.

Plaintiff's failure to request instructions or a special verdict regarding permanent disability constitutes waiver of any claim of error by Plaintiff.

Plaintiff was not denied her right to jury trial based on Plaintiff's own failure to offer instructions or object to their absence. Alternatively, the jury's award reflects that there was no finding of permanent disability and because there was evidence that the Plaintiff's impairment was entirely subjective, the threshold was still unmet, as a matter of law.

IX.

ARGUMENT

POINT I

A. PLAINTIFF FAILED TO MEET THE NO-FAULT THRESHOLD BY FAILING TO PROVE $3,000 IN MEDICAL EXPENSES RELATED TO THE ACCIDENT.

1. WHERE A PLAINTIFF FAILS TO PLEAD AND PROVE THRESHOLD MEDICAL EXPENSES, SHE CANNOT MAINTAIN AN ACTION FOR GENERAL DAMAGES UNDER UTAH LAW.

In this case Plaintiff brought over $3,000 in medical bills to the courtroom alleging they were caused by the accident. See, Exhibit P-3. Upon examination and presentation of the Plaintiff's case, the jury found that only $2,100 in medical expenses were related to this accident. R. 343. As a result the trial court struck the general damages award of $3,000. R. 392-394.

The issue is whether a plaintiff may recover a verdict for general damages when the jury finds that the plaintiff failed to incur medical expenses in excess of $3,000 related to the accident, thus failing to meet the no-fault threshold set forth in U.C.A. § 31A-2-309.

Under Utah no-fault law, a plaintiff must incur more than $3,000 in medical expenses related to the accident or she may not "maintain" an action for general damages. U.C.A. §31A-22-309(1). Plaintiff asserts that once this threshold is met, the action for general damages may be maintained regardless of the jury's evidential verdict on the threshold issue.

Plaintiff's assertion on appeal fails for numerous reasons. First, the plain language and purposes of the no-fault statute are contrary to Plaintiff's position. Second, the burden is on Plaintiff to plead and prove the threshold has been met at all times through trial. Third, the exclusive role of the jury to determine factual issues would be subverted if they were bound by the threshold determination, which is largely based on Plaintiff's pleadings rather than actual proof.

a. Plain Statutory Construction and Legislative Purpose Require Plaintiff Prove Threshold Requirements Have Been Met.

Under Utah law, unless the plaintiff pleads and proves a threshold condition, she is unable to "maintain" her action for general damages. U.C.A. § 31A-22-309; See, Allstate v. Ivie, 606 P.2d 1197, 1200 (Utah 1980). It is important to note that the word "maintain" was chosen by the drafters over the other obvious possibility, "bring." It is very different to say a person must satisfy a condition in order to "bring" an action, as opposed to the fulfilling of the condition in order to "maintain" one. See Jepson v. State Dept. Corrections, 846 P.2d 485, 487 (Utah App. 1993) (no-fault threshold may be met any time up to trial, making statute of limitations accrue at date of accident). By its plain language the Plaintiff must prove the alleged threshold medical expenses were caused by the accident or be unable to maintain the action for general damages, whenever that factual determination is made.

b. The Statutory Purpose Would Be Defeated If Plaintiff Could Recover General Damages Without Proving Threshold Requirements.

The purpose of no-fault law was to replace the common law with tort immunity for persons complying with its provisions until specific thresholds are met. Allstate, at 1200; Pinell v. McCrary, 849 P.2d 848 (Colo. App. 1992) cert. denied (1993). To permit a party who fails to prove a threshold issue to recover general damages, would subject an otherwise immune person to liability for general damages. This result would defeat the express purposes of the no-fault scheme. See Allstate, at 1200. Consistent application of the no-fault immunity requires the Plaintiff prove threshold issues before general damages may be recovered, whether that be at the pretrial, trial or verdict stage.

In Grand v. Durst, 482 A.2d 1008 (Pa. Super. 1984), it was held that the trial court properly ruled the plaintiff could not recover the $7,000 verdict in his favor because the plaintiff had failed to prove any no-fault threshold was satisfied although it had been alleged in the complaint. The Court in Grand, noted, "it is clear that because appellant failed to meet the threshold requirements, he cannot be awarded a verdict in his favor." Id. at 1009, n. 3.

Similarly, in this case, Plaintiff's failure to prove the threshold issue precludes recovery of a general damages award.

The trial court was correct in striking the general damage award in this case.

c. It is Plaintiff's burden to plead and prove the threshold issue to the jury.

In Pinell, the court stated the "statutory threshold is an essential condition of a plaintiff's right to recover damages in a negligence action, and the plaintiff therefore has the burden of pleading and proving facts which establish that one of the threshold criteria has been met." Pinell, at 850. The Court in Pinell, went on stating, "In order to satisfy this burden, a plaintiff must establish not only that he or she actually sustained an injury within the class of injuries specified by statute or incurred expenditures of $2,500, but also that the claimed injury or expenditures were caused by the accident at issue." Id. at 850. The court clarified that even if "the plaintiff incurred medical expenses which have been paid by his insurance carrier pursuant to (the no-fault statute) does not in and of itself answer the question of whether the medical expenses were caused by the accident." Id. at 851.

In Cole v. Berkowitz, 373 N.Y.S. 2d 782, 783 (1975), a case nearly on point with the present case, the plaintiff alleged the threshold was met because he sustained $672 in medical expenses. The jury found, however, that the plaintiff had incurred only $472 in medical expenses related to the accident and awarded total damages of $1,500. The no-fault threshold was $500 at that

time in New York. The court of appeals ruled that the jury's determination was dispositive of the threshold issue and determined that the "jury's special verdict creates a complete bar to the recovery of non-economic loss (i.e., pain and suffering) which was the gravamen of plaintiff's damages on the trial." Id. at 783; see also Grand, at 1009, n.3.

Therefore, pursuant to the above authority, it was Plaintiff's burden to plead and prove that her medical expenses exceeded the threshold amount. Plaintiff's failure to convince the jury that the threshold damages were incurred is fatal to her ability to maintain a claim for general damages under Utah no-fault law.

d. The Determination Of Medical Expenses Related To The Accident Is Exclusively The Role Of The Jury.

According to the Court in Pinell, "whether a plaintiff has met the statutory threshold is usually a question of fact." Id. at 850. The jury's determination of threshold issues must be permitted as a part of its fact finding role. To rule otherwise would be removing an essential element of the jury function to which Plaintiff fiercely claims a right in her brief on appeal. Consistency dictates that the jury be the conclusive arbitrar of the threshold issue of whether Plaintiff's alleged medical expenses were incurred as a result of the accident.

2. THERE WAS EVIDENCE UPON WHICH THE JURY COULD FIND LESS THAN THRESHOLD MEDICAL EXPENSES.

On appeal, Plaintiff bears the heavy burden of showing the verdict was not supportable by the evidence. Cambelt, at 1242. At trial, Plaintiff has the burden of showing that the medical expenses were reasonable and necessary. The defendant does not need to prove unreasonableness. Jorgensen v. Heinz, 847 P.2d 181 (Colo. App. 1992) cert. denied (1993). In that light Plaintiff has erroneously complained that there was no testimony contesting the reasonableness of Plaintiff's medical bills, and therefore, they were sufficient as a matter of law. Moreover, Plaintiff admits in her brief that there was a dispute over whether all her medical expenses were related to the accident. See Brief of Appellant, p. 8.

While the testifying doctors did not specifically attack the reasonableness of each of the Plaintiff's treatments, the jury is not bound by the of the doctors' failure to address the issue. In making its determination, the jury will be permitted to rule on issues of credibility and reasonableness. In Pinell, the court also held that the jury was free to believe or disregard the opinions of the medical experts as they were, "not necessarily conclusive on the jury," especially where the experts' opinions were founded, in part, on the subjective complaints of the witness. Id. at 852.

By both evidence and argument, Defendants strenuously contested the relation of the medical expenses to the accident. The following examples from the record clearly show evidence was presented showing the alleged expenses were unrelated to the accident at issue. These facts were sufficient for a jury to base its decision that the medical expenses claimed were not all related to the accident.

The evidence showed that Plaintiff had a one-year hiatus from any therapy or treatment by Dr. Whitley from November 1989 to November of 1990. TR. 135. Not only did Plaintiff fail to seek medical care during that time, she repeatedly canceled appointments. TR. 804; Exhibit 3.

Further, her return to the chiropractor for treatment coincided with her second pregnancy. She returned to the chiropractor in November of 1990 in her twenty-third week of pregnancy complaining of low back pain. TR. 159. Plaintiff's own doctor testified that the effects of pregnancy alone could cause the type of pain she experienced in her back. TR. 160-161.

She also testified after her baby was born she did not continue with exercises prescribed by treating doctors. TR. 88. She was seen by her chiropractor an additional fifteen times after returning to her chiropractor in November of 1990. TR. 804; Exhibit 3.

The jury was free to assimilate this evidence along with the bills submitted by Plaintiff's doctors and determine that some or

all of the treatments incurred were not related to the accident, but associated with other factors such as her pregnancy. Further the jury was free to determine that Plaintiff had not mitigated her damages by failing to perform prescribed exercises as directed by her doctors, thereby making some or all of the medical bills unnecessary or unreasonable.

It is obvious that there was ample evidence presented upon which a jury could rely to find that Plaintiff's medical bills were, at least in part, unrelated to the accident at issue in this case. It is strictly within the providence of the jury to make such determinations based on the weight of the evidence and credibility of the witnesses. Plaintiff cannot be heard to complain that the jury found that she did not incur over $3,000 in medical expenses when there was evidence upon which they jury could have based its decision. The trial court in this case was entirely correct in determining that the threshold had not been met and that the suit could not be maintained for general damages as a result.

B. PLAINTIFF FAILED TO PRESENT ANY EVIDENCE OR EVEN QUESTIONS OR INSTRUCTIONS ON DISABILITY TO THE JURY, WAIVING ANY CLAIM OF ERROR OR THAT JURY TRIAL WAS DENIED, AND FAILING TO MEET THE THRESHOLD UNDER UTAH LAW.

It is a matter of record that Plaintiff did not specifically address the issue or even prosecute her claim as one of permanent disability to satisfy the no-fault threshold. Rather, there was only testimony of Plaintiff's impairment. As stated above, it is

the Plaintiff's duty to plead and prove that a no-fault threshold has been met. Pinell, at 850. In this case Plaintiff assigns error to the Court's failure to acknowledge that plaintiff was permanently disabled because she received an impairment rating and failure to instruct the jury accordingly.

As will be shown, the Plaintiff failed to present any evidence or offer any instruction regarding permanent disability or object to the court's exclusion of such instructions, thereby waiving any claim of error on appeal. See U.R.C.P. 49, 51. Further, even if the issue of disability should have been addressed by the jury, there was no evidence of permanent disability presented by the Plaintiff below. Finally, even if an impairment rating can be considered a finding of permanent disability, any error was harmless because there was evidence that the impairment was subjective, rather than objective in nature.

1. PLAINTIFF FAILED TO PLEAD OR PROVE PERMANENT DISABILITY, MAKING HER CLAIM OF DENIAL OF JURY TRIAL ON THE ISSUE IS MERITLESS.

Throughout the trial, Plaintiff confused the term impairment with the term disability. See, e.g., TR. 111. Prior to trial Defendant brought a Motion in Limine addressing the fact that impairment ratings were not the equivalent of a disability rating for purposes of claiming damages in tort cases. R. 254; see e.g., Northwest Carriers v. Industrial Comm., 639 P.2d 138, 140 n.3. (Utah 1981).

In order to determine whether a person is disabled, an impairment rating alone is insufficient. According to the AMA guidelines:

> "Medical Impairment" and "Disability" Are Not Interchangeable: Medical impairment is an alteration of the individual's health status assessed by medical means. *Disability* is an alteration of an individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements.

Babitsky, Understanding The AMA Guides In Worker's Compensation, p.36 (1992) (citing AMA Guides (3d ed. 1988 at 8)); See accord Northwest Carriers v. Ind. Comm'n, 639 P.2d 138, 140-141 (Utah 1981). Utah recognizes this distinction. See Northwest Carriers, supra.

In this case, no evidence was ever introduced which attempted to correlate the medical findings of impairment with an assessment in their impact on Plaintiff's lifestyle, earning capacity or job functions (disability). As Dr. Moress testified simply finding that a person is medically impaired may not indicate any associated disability:

> Okay. Then you're talking about this ability, disability, which is like judicial or a -- it's not a medical -- disability is not a medical term. That's for lawyers and judges and administrative law judges to determine, any people who get people back to work, to determine whether or not you can function with it, with a disability.
>
> * * *
>
> A neurosurgeon who loses the right thumb may be 25 percent impaired but would be a hundred percent disabled in terms of his or her profession.
>
> * * *

> When it comes to Mrs. Chanhmany and her problem, it would depend on the type of work she did. She would really actually determine that -- specifically she would need to have a functional capacity evaluation which you -- which I don't know. None has been done on her."

TR. 221-222.

Here there was no evidence presented that Plaintiff suffered from a permanent inability to perform any occupational functions, incurred loss of earning potential, or other permanent disability. Contrary to Plaintiff's inference of ADA accommodation, Plaintiff did not testify that she was reassigned to a different job because of her injury. See TR. 90-91.

Moreover, there was no evidence offered from a vocational rehabilitation standpoint that Plaintiff was disabled and precluded from any field or type of employment previously available to her. Witnesses from Plaintiff's employment testified she only required assistance at work for a few weeks. TR. 260. The fact she was reassigned, absent additional evidence, does not permit the conclusion that she was unable to work or was disabled.

There was also evidence presented to the jury that Plaintiff was not limited in any objective manner from performing all of the activities of daily living. Dr. Moress testified that he could find no objective basis for her rated impairment. TR. 217. The jury was justified in believing the testimony of Dr. Moress over that of Dr. Whitely.

The court in Cole, supra, found that the only other possible basis for claiming the threshold had been met in that case (permanent disability) had been properly removed from the jury by the plaintiff's failure to present any evidence of permanent disability. See, Cole, at 783.

In this case, Plaintiff failed to show any evidence of permanent disability as opposed to evidence of impairment, thereby failing to plead and prove the threshold element of permanent disability as a matter of law. The court was entirely correct in not submitting the issue to the jury in light of Plaintiff's failure to bring any evidence of permanent disability. The jury's decision in light most consistent with the verdict, also indicates that there was no finding of permanent injury and that there was evidence that no permanent injury was sustained.

2. FAILURE TO REQUEST INSTRUCTIONS OR SPECIAL VERDICTS REGARDING PERMANENT DISABILITY RESULTS IN WAIVER.

Under the Utah Rules of Civil Procedure, failure to offer specific objections to instructions given or the Court's or failure to give them will constitute waiver of error on appeal. U.R.C.P. 49, 51; Cambelt Int'l. Corp. v. Dalton, 745 P.2d 1239 (Utah 1987); Fuller v. Zinik Sporting Goods, Inc., 538 P.2d 1036 (Utah 1975).

The Plaintiff knew that the issue of whether permanent disability could be established by merely alleging impairment was

contested prior to trial by motion and Plaintiff knew that it would be contested at trial. See Motion in Limine, R. 254-259. However, Plaintiff failed to request any instructions or object to the trial court's failure to include instructions or special verdicts regarding a finding of permanent disability by the jury. Instead, Plaintiff chose to posture her case exclusively on the medical expense threshold and use the impairment rating as an indicator of Plaintiff's general damages. Plaintiff's own proposed jury instructions merely use disability and impairment as a measure of general damages. R. 106, 111. Plaintiff's disingenuous claim that the court "concluded" Plaintiff was disabled misrepresents the context of the judge's statement, which was made outside of the presence of the jury on a tangential issue. TR. 268-271.

Plaintiff's claim that she was denied a jury trial on the issue omits the obvious fact that she was the architect of her case and failed to bring the issue to the court for resolution. No error can be found with the Court for Plaintiff's own lack of prosecution of the issue.

Plaintiff's failure to understand the difference between impairment and disability while prosecuting the case should not work to Defendants' detriment. To find otherwise gives Plaintiff two bites at the apple. Plaintiff wittingly chose not to seek of obtain expert opinion on permanent disability, instead she chose to rely on the impairment rating (and disability) as an element

of her general damages and relied solely on the medical expenses to meet the no-fault threshold. She cannot be allowed to alter her basis for recovery after trial when the claim was available to her initially and not pursued.

3. CLAIMS OF DISABILITY FAIL BASED ON HARMLESS ERROR.

Even if Plaintiff's case actually presented evidence of permanent disability sufficient to meet the threshold and the issue should have been submitted to the jury, there was admissible, credible evidence showing that Plaintiff had suffered no objectively ascertainable impairment. On appeal Plaintiff points to the recently passed amendment to U.C.A. § 31A-22-309, in an effort to show that an impairment rating is equivalent to a finding of permanent disability, permitting her to maintain an action. However, Plaintiff glosses over the fact that even the new statute requires that the impairment rating be based on "objective findings". Id.

In this case there was specific testimonial evidence presented by Dr. Moress that the Plaintiff's impairment rating was based solely on her subjective complaints and not on any medically objective findings. TR. pp. 216-217; 220-221. Therefore, even assuming that the issue should have gone to the jury on the basis of an impairment rating alone, the threshold still had not been met because the jury could have believed the testimony of Dr. Moress that the impairment rating Plaintiff received was based only on subjective factors.

Further, the fact that the jury found only $3,000 in general damages, and specifically found that amount was to include the one week vacation she missed as a result of the accident, indicates that there was no belief that she was permanently disabled, especially in light of Plaintiff's attorney's request for over $50,000 in general damages. TR. 343. Therefore, any claim of error is harmless and is not grounds for reversal or new trial. U.R.C.P. 61.

4. PLAINTIFF'S CLAIMS OF DENIAL OF JURY TRIAL AND JURY PREJUDICE ARE MERITLESS.

a. Plaintiff's Claim of Right To Jury Trial On The Issue Of Disability Is Meritless.

The above evidence shows clearly that Plaintiff did not attempt to prove disability at trial, precluding a claim of error on appeal. Plaintiff merely argued impairment as an element of general damages. Plaintiff failed to object or offer instructions defining disability or even propose a special verdict on the issue. Merely because Plaintiff failed to bring a potential issue before the jury through her own waiver and oversight does not merit reconsideration on appeal or a motion for new trial. Plaintiff's argument of failure to afford her a jury trial on the issue of permanent disability must be rejected.

b. Plaintiff's Claims Of Jury Prejudice Are Spurious.

Plaintiff claims that the verdict was the result of prejudice against the chiropractic profession by two jurors. The

argument disingenuously claims that two jurors disregarded the evidence and found some of Dr. Whitley's bills unnecessary. Plaintiff would pretend by this argument that she had no opportunity to prevent the alleged prejudice.

Under U.R.C.P. 47, where a party knows or believes a juror is biased before the jury is sworn, failure to challenge the juror before the empanelment constitutes waiver. Burton v. ZCMI, 249 P.2d 514 (Utah 1952). In this case, the record clearly demonstrates that Plaintiff's counsel, with full knowledge of the now alleged prejudicial disposition of the two jurors, passed the jurors for cause. TR. 44-46. Further, Plaintiff's counsel did not exercise preemptory challenges to excuse the two jurors now alleged to have been prejudiced. Id. The lack of merit to the argument is obvious. Plaintiff cannot be heard to complain of prejudice in light of her counsel's own failure to act to remove the allegedly biased jurors.

X.

CONCLUSION

Appellee has shown that Plaintiff has failed to sustain her burden of proving a no-fault threshold has been met at trial. Therefore, the court was correct in ruling that Plaintiff could not recover general damages as a matter of law.

Plaintiff failed to prove threshold medical expenses and failed to offer any proof of permanent disability. Further, Plaintiff waived all claims of error on the court's failure to

instruct the jury regarding permanent disability by its own failure to offer instructions or special verdicts. Finally, Plaintiff has waived claims of juror bias on appeal because Plaintiff was fully aware of the alleged bias prior to smearing the jury and she failed to challenge the jurors.

Plaintiff's appeal must be denied and the court's judgment on the verdict, and denial of Plaintiff's motion for new trial should be affirmed.

Respectfully submitted this 15th day of June, 1994.

HANSON, EPPERSON & SMITH

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellee Bone, postage prepaid, this 15th day of June, 1994, to the following:

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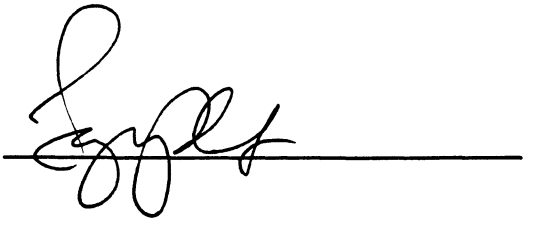

APPENDIX

APPENDIX

History: C. 1953, 31A-22-307, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 159; 1989, ch. 261, § 13; 1990, ch. 327, § 8; 1991, ch. 74, § 7.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, inserted "maintaining, and administering" in the next-to-last sentence in Subsection (2)(a), added present Subsection (2)(d) and redesignated former Subsection (2)(d) as present Subsection (2)(e) and made minor stylistic changes in Subsection (1)(a) and in the second sentence in Subsection (2)(a).

NOTES TO DECISIONS

Analysis

Allowable benefits.
—Loss of earnings.

Allowable benefits.

—Loss of earnings.

A claimant who was unemployed at the time of his or her accident can collect disability benefits for lost wages from prospective employment only if the claimant establishes that a job was available for which the claimant was qualified and that the claimant would have taken that job. The legislature did not intend to provide compensation for "loss of earning capacity" unless a claimant has suffered a direct and specific monetary loss. Versluis v. Guaranty Nat'l Cos., 199 Utah Adv. Rep. 6 (1992).

31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

(a) death;

(b) dismemberment;

(c) permanent disability;

(d) permanent disfigurement; or

(e) medical expenses to a person in excess of $3,000.

(2) (a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;

(iii) to any injured person, if the person's conduct contributed to his injury:

(A) by intentionally causing injury to himself; or

(B) while committing a felony;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 re reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because he is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, ncluding those policies complying with this part, primary coverage is given ıy the policy insuring the motor vehicle in use during the accident.

(5) Payment of the benefits provided for in Section 31A-22-307 shall be nade on a monthly basis as expenses are incurred. Benefits for any period are ıverdue if they are not paid within 30 days after the insurer receives reasonıble proof of the fact and amount of expenses incurred during the period. If 'easonable proof is not supplied as to the entire claim, the amount supported ıy reasonable proof is overdue if not paid within 30 days after that proof is 'eceived by the insurer. Any part or all of the remainder of the claim that is .ater supported by reasonable proof is also overdue if not paid within 30 days ıfter the proof is received by the insurer. If the insurer fails to pay the exıenses when due, these expenses shall bear interest at the rate of 1½% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

History: C. 1953, 31A-22-309, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 160; 1988 (2nd S.S.), ch. 10, § 10; 1991, ch. 74, § 8; 1992, ch. 230, § 9.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, made minor stylistic changes in Subsection (1) and rewrote Subsection (2)(a)(i), which read: "for any injuries sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy."

The 1992 amendment, effective April 27, 1992, inserted "or is required to have" near the beginning of Subsection (1).

Compiler's Notes. — This rule is similar to Rule 46, F.R.C.P.

Cross-References. — Objections to instructions to jury, U.R.C.P. 51.

NOTES TO DECISIONS

ANALYSIS

In general
Form of verdict
—Duty to examine and object.
Instructions
—Right to object
——Harmless error.
Cited

In general.

To preserve a question for appeal, an objection must be clear and concise and made in a fashion calculated to obtain a ruling thereon. Doe v. Hafen, 772 P.2d 456 (Utah Ct. App. 1989), cert. denied, 800 P.2d 1105 (Utah 1990).

Form of verdict.

—Duty to examine and object.

Counsel has the obligation not only to object to the form of the verdict, but to affirmatively seek to examine it, by failing to request court permission to examine the verdict and make objection to it, party waived any objection to the verdict form. Martineau v. Anderson, 636 P.2d 1039 (Utah 1981).

Instructions.

—Right to object.

The parties have a right to make objections to the instructions to preserve challenges to their accuracy, if counsel was prevented from making objections to instructions, he should, under this rule, be deemed to have done so. Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960).

——Harmless error.

If the instructions are correct, any error which prevents counsel from making objections thereto is harmless error. Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960).

Cited in Watters v. Querry, 626 P.2d 455 (Utah 1981); Broberg v. Hess, 782 P.2d 198 (Utah Ct. App. 1989).

COLLATERAL REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d Appeal and Error § 501, 5 Am. Jur. 2d Appeal and Error §§ 545, 553, 558.

C.J.S. — 4 C.J.S. Appeal and Error § 202 et seq.

A.L.R. — Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial, 76 A.L.R. Fed. 619.

Key Numbers. — Appeal and Error ⇐ 169 et seq., 248.

Rule 47. Jurors.

(a) **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

(b) **Alternate jurors.** The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

(c) **Challenge defined; by whom made.** A challenge is an objection made to the trial jurors and may be directed (1) to the panel or (2) to an individual juror. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made.

(d) **Challenge to panel; time and manner of taking; proceedings.** A challenge to the panel can be founded only on a material departure from the forms prescribed in respect to the drawing and return of the jury, or on the

intentional omission of the proper officer to summon one or more of the jurors drawn. It must be taken before a juror is sworn. It must be in writing or be noted by the reporter, and must specifically set forth the facts constituting the ground of challenge. If the challenge is allowed, the court must discharge the jury so far as the trial in question is concerned.

(e) **Challenges to individual jurors; number of peremptory challenges.** The challenges to individual jurors are either peremptory or for cause. Each party shall be entitled to three peremptory challenges, except as provided under Subdivisions (b) and (c) of this rule.

(f) **Challenges for cause; how tried.** Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by law to render a person competent as a juror.

(2) Consanguinity or affinity within the fourth degree to either party, or to an officer of a corporation that is a party.

(3) Standing in the relation of debtor and creditor, guardian and ward, master and servant, employer and employee or principal and agent, to either party, or united in business with either party, or being on any bond or obligation for either party; provided, that the relationship of debtor and creditor shall be deemed not to exist between a municipality and a resident thereof indebted to such municipality by reason of a tax, license fee, or service charge for water power, light or other services rendered to such resident.

(4) Having served as a juror, or having been a witness, on a previous trial between the same parties for the same cause of action, or being then a witness therein.

(5) Pecuniary interest on the part of the juror in the result of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

(6) That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

Any challenge for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of such challenge.

(g) **Selection of jury.** The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, in the order called, and each side, beginning with the plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(h) **Oath of jury.** As soon as the jury is completed an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and a true verdict rendered according to the evidence and the instructions of the court.

(i) **Proceedings when juror discharged.** If, after the impanelling of the jury and before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or to swear a new juror and commence the trial anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried with a new jury.

(j) **View by jury.** When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person other than the person so appointed shall speak to them on any subject connected with the trial.

(k) **Separation of jury.** If the jurors are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) **Deliberation of jury.** When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he must not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(m) **Papers taken by jury.** Upon retiring for deliberation the jury may take with them the instructions of the court and all exhibits and all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.

(n) **Additional instructions of jury.** After the jury have retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court the information required must be given in the presence of, or after notice to, the parties or counsel. Such information must be given in writing or taken down by the reporter.

(o) **New trial when no verdict given.** If a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) **Court deemed in session pending verdict; verdict may be sealed.** While the jury is absent the court may be adjourned from time to time in respect to other business, but it shall be open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court, in case of an agreement during a recess or adjournment for the day.

(q) **Declaration of verdict.** When the jury or three-fourths of them, or such other number as may have been agreed upon by the parties pursuant to Rule 48, have agreed upon a verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which shall be done by the court or

clerk asking each juror if it is his verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.

(r) **Correction of verdict.** If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

Compiler's Notes. — Subdivisions (a) and (b) of this rule are similar to Rule 47, F.R.C.P.

Cross-References. — Jurors generally, § 78-46-1 et seq.

Three-fourths of jurors may find verdict in civil case, Utah Const., Art. I, Sec. 10.

Witness, juror as, § 78-24-3; U.R.E. 606.

NOTES TO DECISIONS

ANALYSIS

Additional instructions.

—Absence of counsel.

——Prejudice.

Where, upon request of the jury, the trial court brought the jury back into the courtroom, explained apparently conflicting instructions, told the jury to reread all instructions, and offered future assistance if needed, unless appellant could show substantial or prejudicial error, it was not error to have proceeded without appellant's counsel who had left the court building. Tjas v. Proctor, 591 P.2d 438 (Utah 1979).

—Entry of judge into jury room.

Where bailiff had informed trial judge that jurors wanted advice on a certain point, it was improper for judge to go into jury room to advise them in absence of and without consent of counsel. Johnson v. Maynard, 9 Utah 2d 268, 342 P.2d 884 (1959).

Challenges for cause.

—Acquaintance with party.

In action by truck owner whose vehicle was damaged when it struck defendant's cow on highway, plaintiff's challenge of jurors for cause on grounds they were acquainted with defendant and were engaged in raising livestock did not fall within grounds specified in this rule, and failure to remove challenged jurors from panel was not an abuse of discretion. C.R. Owens Trucking Corp. v. Stewart, 29 Utah 2d 353, 509 P.2d 821 (1973).

—Bias or prejudice.

——Malpractice.

In a medical malpractice action, prospective juror's statement made on voir dire examination that she would give more weight to the defendant doctor's testimony because of his status as a doctor established bias and prejudice, which was not obviated by her statement that if the doctor's testimony was not in accord with the evidence she would accept the other evidence, and she should have been removed for cause; forcing party to use a peremptory challenge to remove such prospective juror was prejudicial error. Jenkins v. Parrish, 627 P.2d 533 (Utah 1981).

——Religious affiliation.

Whenever a religious organization is a party to the litigation, voir dire regarding the jury panel's religious affiliations is proper. Hornsby v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints, 758 P.2d 929 (Utah Ct. App.), cert. denied, 773 P.2d 45 (Utah 1988).

——Waiver of right to challenge.

Ordinarily, if a party knows or believes that a juror or jury is disqualified because of bias or prejudice, the challenge must be asserted be-

Propriety of substituting juror in bifurcated state trial after end of first phase and before second phase is given to jury, 89 A.L.R.4th 423.

Examination and challenge of federal case jurors on basis of attitudes toward homosexuality, 85 A.L.R. Fed. 864.

Key Numbers. — Jury ⇐ 66, 72, 112, 114 to 121, 125, 126, 131(1) to 133, 136, 148, 149; Trial ⇐ 28, 303, 307, 312, 313, 316, 321, 321½, 324, 325, 339, 340

Rule 48. Juries of less than eight — Majority verdict.

The parties may stipulate that the jury shall consist of any number less than eight or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Compiler's Notes. — This rule is similar to Rule 48, F.R.C.P.

Cross-References. Number of jurors, § 78-46-5

Three-fourths of jurors may find verdict in civil case, Utah Const., Art. I, Sec. 10.

NOTES TO DECISIONS

ANALYSIS

Effect of Rule 47(q).
Removal of municipal officer.

Effect of Rule 47(q).

Intent of U.R.C.P. 47(q) is to allow the parties the opportunity to ensure that the requisite number of jurors concurred in the verdict; it is not a vehicle to bring into issue the court's instruction as to the number of concurring jurors required to reach a verdict. Madesen v. Brown, 701 P.2d 1086 (Utah 1985).

Removal of municipal officer.

Removal of municipal officer does not require unanimous verdict by a jury; a three-fourths majority is acceptable. Madesen v. Brown, 701 P.2d 1086 (Utah 1985).

COLLATERAL REFERENCES

Am. Jur. 2d 47 Am. Jur. 2d Jury § 124 et seq.

C.J.S. — 50 C.J.S. Juries § 123, 89 C.J.S. Trial § 494.

A.L.R. — Validity of agreement, by stipulation or waiver in state civil case, to accept verdict by number or proportion of jurors less than that constitutionally permitted, 15 A.L.R.4th 213.

Key Numbers. — Jury ⇐ 32(2); Trial ⇐ 32½

Rule 49. Special verdicts and interrogatories.

(a) **Special verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict

(b) **General verdict accompanied by answer to interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58A. When the answers are consistent with each other but one or more is inconsis-

tent with the general verdict, judgment may be entered pursuant to Rule 58A in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Compiler's Notes. — This rule is similar to Rule 49, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Ambiguous interrogatories or verdicts.

When special interrogatories or verdicts are ambiguous, counsel has an obligation either to object to the filing of the verdict or to move that the cause be resubmitted to the jury for clarification; if a party fails to take appropriate action before the discharge of the verdict, that party generally may not later move for a new trial on the ground that the verdict was defective. Bennion v. LeGrand Johnson Constr. Co., 701 P.2d 1078 (Utah 1985).

Appeals.

Where plaintiff did not object below, it cannot raise the failure to give special verdicts or interrogatories on appeal without showing special circumstances warranting such a review. Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239 (Utah 1987).

Discretion of court.

The matter of entering judgment in accordance with the answers to special interrogatories is within the discretion of the trial judge. Weber Basin Water Conservancy Dist. v. Nelson, 11 Utah 2d 253, 358 P.2d 81 (1960).

Use of a special verdict is left to the discretion of the trial court. Reiser v. Lofner, 641 P.2d 93 (Utah 1982), overruled on other grounds, Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

It is within the broad discretion of the trial court to determine if special interrogatories are to be used and, if so used, the content thereof. E.A. Strout W. Realty Agency, Inc. v. W.C. Foy & Sons, 665 P.2d 1320 (Utah 1983).

The use of special verdicts or interrogatories is a matter for the trial court's sound discretion. Cambelt Int'l Corp. v. Dalton, 745 P.2d 1239 (Utah 1987).

Effect of inconsistent answers.

A new trial does not have to be granted merely because the answers to special verdict questions are inconsistent. Milligan v. Capitol Furn. Co., 8 Utah 2d 383, 335 P.2d 619 (1959).

Entering judgment in accordance with answers.

Where jury's general verdict in a condemnation case was in conflict with its answers to special interrogatories as to the value of the property before and after taking, the matter of entering judgment in accordance with the answers was within discretion of the trial judge and was properly exercised in the case. Weber Basin Water Conservancy Dist. v. Nelson, 11 Utah 2d 253, 358 P.2d 81 (1960).

Interest.

Any litigant may demand the interest issue in an action for payment of past due money be submitted to the jury on special interrogatory where that issue has not been reserved for resolution by the trial court; if he fails to so demand he waives his right to trial of that issue by jury. Lignell v. Berg, 593 P.2d 800 (Utah 1979).

Where defendant waived jury's determination of issue of interest on award by not voicing his claim until after jury's dismissal, thereby presenting the issue to trial court for final determination, trial court's determination that jury had considered interest issue in its deliberation and that award in fact incorporated an interest payment was not arbitrary or capricious and would not be altered on appeal. Ute-Cal Dev. Corp. v. Sather, 605 P.2d 1240 (Utah 1980).

Objections to questions.

Where defendant did not object to questions submitted in special verdict, he cannot on appeal raise the issue that the questions were confusing. Baker v. Cook, 6 Utah 2d 161, 308 P.2d 264 (1957).

Proximate cause issue.

Where the case is submitted under a general verdict, proximate cause is for the jury. Milligan v. Capitol Furn. Co., 8 Utah 2d 383, 335 P.2d 619 (1959).

Role of jury.

—Special verdicts.

Special verdicts that plaintiff both suffered a specified amount of damages and was guilty of contributory negligence were not inconsistent and thereby void, since in special verdict jury finds facts and court applies law. Brigham v. Moon Lake Elec. Ass'n, 24 Utah 2d 292, 470 P.2d 393 (1970).

Special interrogatories.

Whenever there is uncertainty or doubt in

—Splitting of negligence and damages issues.

Judgment n.o.v. in favor of patient in personal injury action against hospital on the question of negligence and ordering of new trial to determine amount of damages was improper since, in personal injury action, question of how accident happened, who was at *fault, and pain and injury occasioned thereby* are so intermingled that if trial is ordered, in fairness to both parties, it should be on all issues. Hyland v. St. Mark's Hosp., 19 Utah 2d 134, 427 P.2d 736 (1967).

Cited in Collier v. Frerichs, 626 P.2d 476 (Utah 1981); Jepsen v. Tenhoeve, 656 P.2d 427 (Utah 1982); Wilderness Bldg. Sys. v. Chapman, 699 P.2d 766 (Utah 1985); Gagon v. State Farm Mut. Auto. Ins. Co., 746 P.2d 1194 (Utah Ct. App. 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d Judgments §§ 106 to 151; 75A Am. Jur. 2d Trial § 857 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 59 to 61; 88 C.J.S. Trial §§ 249 to 265.

A.L.R. — Dismissal, nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action, 5 A.L.R.3d 1405.

Propriety and prejudicial effect of counsel's argument or comment as to trial judge's refusal to direct verdict against him, 10 A.L.R.3d 1330.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Key Numbers. — Judgment ⇐ 199; Trial ⇐ 167 to 181.

Rule 51. Instructions to jury; objections.

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, *objections may be made to the instructions after they are given to the jury, but* before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.
(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule varies substantially from Rule 51, F.R.C.P., after which it is patterned.

Cross-References. — Exceptions unnecessary, U.R.C.P. 46.

NOTES TO DECISIONS

ANALYSIS

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 979 et seq.
C.J.S. — 49 C.J.S. Judgments §§ 574 to 584.
A.L.R. — Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.
Key Numbers. — Judgment ⇐ 891 to 899.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.
Cross-References. — Harmless error not ground for new trial, Rule 61. Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

NOTES TO DECISIONS

ANALYSIS

Abandonment of motion.
Accident or surprise.
Arbitration awards.
Caption on motion for new trial.
Correction of insufficient or informal verdict.
Correction of record.
Costs.
Decision against law.
Discretion of trial court.

relief from judgment under Rule 61 of Civil Procedure 60(b), 3 A.L.R. Fed. 956.

Construction of Rule 60(a) of Federal Rules of Civil Procedure authorizing correction of clerical mistakes and judgments, orders or other parts of the records and errors therein arising from oversight or omission, 13 A.L.R. Fed. 794.

Construction and application of Rule 60(b)(5) of Federal Rules of Civil Procedure authorizing relief from final judgment where its prospective application is inequitable, 14 A.L.R. Fed. 309.

Independent actions to obtain relief from judgment, order, or proceeding under Rule 60(b) of the Federal Rules of Civil Procedure, 53 A.L.R. Fed. 558.

Lack of jurisdiction, or jurisdictional error, as rendering federal district court judgment "void" for purposes of relief under Rule 60(b)(4) of Federal Rules of Civil Procedure, 59 A.L.R. Fed. 831.

Effect of filing of notice of appeal on motion to vacate judgment under Rule 60(b) of Federal Rules of Civil Procedure, 62 A.L.R. Fed. 165.

Who has burden of proof in proceeding under Rule 60(b)(4) of Federal Rules of Civil Procedure to have default judgment set aside on ground that it is void for lack of jurisdiction, 102 A.L.R. Fed. 811.

Key Numbers. — Judgment ⇐ 294 et seq., 306, 307.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Compiler's Notes. — This rule is similar to Rule 61, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Admission of evidence.

No prejudice results from the fact that part of the testimony as to a particular matter is hearsay where the witness also has personal knowledge of that matter, and testifies accordingly. Hardman v. Thurman, 121 Utah 143, 239 P.2d 215 (1951).

Where the case was tried by the court without a jury, error in receiving testimony of a party who was disqualified to testify by dead man statute was insufficient to constitute any ground for reversal since there was ample evidence without such testimony to support the finding of the trial court. Thatcher v. Merriam, 121 Utah 191, 240 P.2d 266 (1952).

Facts that some evidence of insurance agents inadvertently got into the record was not prejudicial under the circumstances of the case, especially since one of the defendants was a large corporation, and there was no apparent reason why a jury would find against an insurance company and not against such a defendant. Tuttle v. Pacific Intermountain Express Co., 121 Utah 420, 242 P.2d 764 (1952).

Where personal injury plaintiff had introduced evidence as to her sales ability and her opportunity for success and loss of probable income of $1000 per month, it was not prejudicial error for defendant to be allowed to show that plaintiff had filed for bankruptcy and had unpaid judgments against her. Bullock v. Ungricht, 538 P.2d 190 (Utah 1975).

Affidavits regarding the jury's request for a dictionary to define "proximate" in order to understand "proximate cause" were admissible where a question existed as to whether or not use of the dictionary was "prejudicial." Hillier v. Lamborn, 740 P.2d 300 (Utah Ct. App.), cert. denied, 765 P.2d 1277 (Utah 1987).

Amendment of pleadings.

Where the court did not find that the defendant maintained an attractive nuisance as had been alleged in an amendment to the complaint, no prejudicial error was committed by the court in permitting the plaintiff to file the amendment and to offer evidence thereto, over the objections of the defendant. Draper v. J.B. & R.E. Walker, Inc., 121 Utah 567, 244 P.2d 360 (1952).

Burden of showing error.

This rule places upon an appellant the burden of showing not only that an error occurred, but that it was substantial and prejudicial in that the appellant was deprived in some manner of a full and fair consideration of the disputed issues by the jury. Ashton v. Ashton, 733

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

KHAI CHANHMANY,	:	SPECIAL VERDICT
Plaintiff,	:	CASE NO. 910907726
vs.	:	
JOYCE A. PRESTON and BRIAN D. BONE,	:	
Defendant.	:	

Please answer the following questions from a preponderance of the evidence. If you find the evidence preponderates in favor of the issue presented, answer "yes." If you find the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the evidence preponderates against the issue presented, answer "no." Also, any damages assessed must be proven by a preponderance of the evidence.

1. At the time and place and under the circumstances of this case, was the defendant, Joyce A. Preston, negligent?

ANSWER: Yes___ No_X_

2. If you have answered number 1 in the affirmative, was the negligence of Joyce A. Preston a proximate cause of the damages claimed by the plaintiff?

ANSWER: Yes_____ No_____

3. At the time and place and under the circumstances of this case, was the defendant, Brian Bone, negligent?

ANSWER: Yes X No_____

4. If you have answered number 3 in the affirmative, was the negligence of Brian Bone a proximate cause of the damages claimed by the plaintiff?

ANSWER: Yes X No_____

5. If you have answered questions 1, 2, 3 or 4 in the affirmative, state what proportion of said negligence is attributable to:

Joyce A. Preston	0 %
Brian Bone	100 %
TOTAL	100 %

6. Please state the total damages, if any, which have been incurred as a direct consequence of said negligence which would reasonably compensate the plaintiff.

Past Medical Expenses	$ 2150.00
Past Wage Loss	$ 101.00
General Damages include lost wages	$ 3000.00
TOTAL DAMAGES	$ 5251.00

Dated this 21 day of April, 1993.

Connie L. Lloyd
FOREPERSON

JUDGMENT

FILED DISTRICT COURT
Third Judicial District

JUL 29 1993

SALT LAKE COUNTY
By _____ Deputy Clerk

TERRY M. PLANT, #2610
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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

RANDY CHANHMANY, a minor, by and through his natural mother and guardian, KHAI CHANHMANY, and KHAI CHANHMANY, individually,

Plaintiffs,

vs.

JOYCE A. PRESTON and BRIAN D. BONE,

Defendants.

JUDGMENT ON SPECIAL VERDICT

2185031
8-4-93-802 am

Civil No. 910907726PI
Judge John A. Rokich

The above-entitled case was tried before a jury commencing April 27, 1993 and continuing through April 29, 1993 on the complaint of the plaintiff, Khai Chanhmany, versus both Joyce A. Preston and Brian D. Bone. The claim of plaintiff Randy Chanhmany was bifurcated from the case of Khai Chanhmany just prior to the commencement of trial. The jury, having heard evidence produced by the plaintiff Khai Chanhmany, the Court having received the Special Verdict on the jury and also having considered the issue as to whether or not Plaintiff had met the threshold requirements of Utah Code Annotated § 31A-22-309(1) and having made

its Minute Entry on July 1, 1993, based upon the Special Verdict of the jury and the Minute Entry of the Court,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiff Khai Chanhmany was not negligent.

2. The defendant Joyce A. Preston was not negligent.

3. The defendant Brian D. Bone was negligent, and his negligence was the sole proximate cause of the damages claimed by the plaintiff Khai Chanhmany.

4. The total damages which have been incurred by Khai Chanhmany as a direct consequence of the negligence of Brian D. Bone are as follows:

a. Past medical expenses	$2,100.00
b. Past wage loss	101.00
TOTAL	$2,201.00

5. Even though the jury in its Special Verdict found general damages in favor of the plaintiff Khai Chanhmany in the sum of $3,000.00, in accordance with the Minute Entry of the Court dated July 1, 1993, the Court specifically finds that she is not entitled to general damages in this matter because she failed to meet the threshold requirements of § 31A-22-309(1) Utah Code Annotated (1953, as amended). Due to the fact that Plaintiff failed to prove that she had met the $3,000.00 threshold for medical expenses as required by Utah Code Annotated § 31A-22-309(1)(e) (1953, as amended) and further that Plaintiff failed to prove that she had suffered a permanent disability in accordance

with Utah Code Annotated § 31A-22-309(1)(3). The Court further finds that the award made by the jury for general damages was indicative that the jurors did not find Plaintiff suffering from any permanent disability. Further, the Court specifically finds that the plaintiff failed to comply with any of the other potential "threshold" criteria set forth in Utah Code Annotated § 31A-22-309 (1953, as amended).

6. Plaintiff Khai Chanhmany is, therefore, entitled to a judgment against the defendant Brian Bone only in the sum of $2,201.00 plus interest in an amount of $402.30 and costs in the amount of $219.00, for a total judgment of $2,822.30.

7. Defendant Joyce A. Preston is entitled to judgment against the plaintiff Khai Chanhmany on the plaintiff's complaint of no cause of action and is entitled to her taxable court costs from the plaintiff Khai Chanhmany.

8. It was determined that all judgment entered herein will draw interest following the entry of judgment in accordance with Utah statute, Utah Code Annotated § 15-1-4 (1953, as amended).

DATED this 29 day of July, 1993.

BY THE COURT:

John A. Rokich

HONORABLE JOHN A. ROKICH
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing JUDGMENT ON SPECIAL VERDICT, postage prepaid, this 15th day of July, 1993, to the following:

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